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ABEL PORTILLO AND EDIEL LOPEZ

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ADEL PORTILLO and EDIEL LOPEZ

Plaintiff,

vs.

NADER SARNEVESLIT aka NADER
SARNEVESHT doing business as PACIFICA
CONSTRUCTION, BOBBY SARNEVESHT,
and DOES 1-10

Defendants

Case No: C08-00190 JW

FIRST AMENDED COMPLAINT FOR
DAMAGES AND DEMAND FOR JURY
TRIAL:

- 1) Violation of California Labor Code Section 510;
- 2) Violations of the Federal Fair Labor Standards Act;
- 3) Violation of California Business and Professions Code Section 17200; and
- 4) Violation of California Labor Code Section 201;
- 5) Violation of California Labor Code Section 226; and
- 6) Fraudulent Conveyance

NATURE OF CLAIM

1. This is an action on behalf of ADEL PORTILLO ("PORTILLO") and EDIEL LOPEZ ("LOPEZ") who had been employed on a hourly basis by Defendants NADER SARNEVESLIT, also known as NADER SARNEVESHT, dba PACIFICA CONSTRUCTION, and DOES 1-10 (collectively, "PACIFICA CONSTRUCTION") during the two years prior to the filing of this Complaint, seeking damages arising from their employer's failure to pay overtime as required by the Fair Labor Standards Act and

1 the California Wage Orders and statutes. Plaintiffs seek compensatory damages for
2 unpaid wages under California Labor Code and Wage Orders, liquidated damages under
3 29 U.S.C. §216(b), waiting time penalties under California Labor Code § 203, damages
4 for inadequate pay statements under California Labor Code Section 226, and attorney's
5 fees, costs, pre judgment interest pursuant to California Labor Code § 1194(a) and 29
6 U.S.C. § 216(b), and restitution under California Unfair Trade Practices Act under
7 California Business and Professions Code § 17203. Plaintiffs also allege fraudulent
8 conveyance against BOBBY SARNEVESHT.

9 **PARTIES**

- 10 2. At all times relevant herein, Plaintiff PORTILLO is an individual resident of Milpitas,
11 California.
- 12 3. At all times relevant herein, Plaintiff LOPEZ is an individual resident of San Jose,
13 California.
- 14 4. At all times relevant herein, Defendant NADER SARNEVESLIT, also known as
15 NADER SARNEVESHT is the owner of the sole proprietorship of the business called
16 PACIFICA CONSTRUCTION, with its primary place of business in Los Gatos,
17 California.
- 18 5. Individual Defendants NADER SARNEVESLIT, BOBBY SARNEVESHT, and DOES
19 1-10, at all times relevant herein, are, according to information and belief, owners,
20 managers, directors, associates, related to, or employees of PACIFICA
21 CONSTRUCTION having control over the Plaintiffs' work condition and work situation.

22 **GENERAL ALLEGATIONS**

- 23 6. At all times relevant herein, Plaintiffs were employees of Defendant PACIFICA
24 CONSTRUCTION, a construction company doing business in Los Gatos, California.

- 1 7. Plaintiffs were, according to information and belief, employees of Defendant PACIFICA
2 CONSTRUCTION acting in the normal course and scope of employment duties with
3 Defendants.
- 4 8. During the course of Plaintiffs' employment with Defendant PACIFICA
5 CONSTRUCTION, Plaintiffs regularly worked in excess of 8 hours per day and more
6 than 40 hours per week.
- 7 9. Plaintiffs were paid on an hourly basis.
- 8 10. Plaintiffs did not perform "exempt" duties in their positions as a construction worker with
9 Defendants and thus was not subject to any exemption under the Fair Labor Standards
10 Act, 29 *CFR* 541.112, 541.209 and 541.209. The Plaintiffs were not even marginally
11 responsible for management or administrative functions, and their primary job did not
12 require them to exercise independent discretion and judgment or regularly require
13 invention or imagination in a recognized field of artistic endeavor more than fifty percent
14 of their working time.
- 15 11. At no time during the Plaintiffs' employment did Plaintiffs maintain any professional
16 license with the state or practice any recognized profession, nor did Plaintiffs exclusively
17 manage any division of PACIFICA CONSTRUCTION where they customarily and
18 regularly exercised discretionary powers or perform services of management. Plaintiffs
19 did not directly supervise any employees nor did they participate in the development of
20 general administrative policies of PACIFICA CONSTRUCTION.

21 **COUNT ONE**

22 **VIOLATION OF CA LABOR CODE SECTION §510**

23 **FAILURE TO PROPERLY PAY OVERTIME WAGES**

- 24 12. Plaintiffs re-allege and incorporate paragraphs 1-11 as if fully stated herein.
25

1 13. California Labor Code Section 501, applicable at all times relevant herein to Plaintiffs'
2 employment by Defendants, provides that all employees are entitled to payment at the
3 rate of time and one half for hours in excess of 8 in one day, or 40 hours in one week, and
4 double time for hours in excess of 12 in one day.

5 14. During the course of employment with Defendants, Plaintiffs regularly worked in excess
6 of 8 hours a day and 40 hours per week, however the Defendants knowingly and
7 willingly failed to pay Plaintiffs overtime wages as required by law.

8 15. California Labor Code Section 1194 provides that it is unlawful for employers not to
9 make the required overtime payments identified in the preceding paragraph and that
10 employees not paid such payments can recover any monies owed by civil action.

11 16. Defendants therefore owe Plaintiffs overtime wages not properly paid to Plaintiffs in an
12 amount to be determined at trial.

13 17. Defendants have failed and refused and continue to fail and refuse to pay Plaintiffs the
14 amount owed.

15 18. Defendants' failure to pay Plaintiffs the required sum violates the provisions of Labor
16 Code Sections 510 and 1194 and is therefore unlawful.

17 19. Pursuant to Labor Code Section 1194(a), Plaintiffs request that the court award Plaintiffs
18 reasonable attorney's fees and costs incurred by them in this action.

19 **COUNT TWO**

20 **VIOLATION OF THE FAIR LABOR STANDARDS ACT**

21 **FAILURE TO PROPERLY PAY OVERTIME WAGES**

22 20. Plaintiffs re-allege and incorporate paragraphs 1-19 as if fully stated herein.

23 21. At all relevant times herein, Plaintiffs' employment was subject to the provisions of the
24 Fair Labor Standards Act of 1938, as amended ("FLSA"), 29 U.S.C. § 201, et seq. and
25

1 Plaintiffs were individual employees covered by virtue of Plaintiffs' direct engagement
2 in interstate commerce.

3 22. The FLSA, 29 U.S.C. § 207 requires all employees to be paid overtime for work
4 performed in excess of forty hours per week, unless specifically exempted by the law.

5 23. Although Plaintiffs were not so exempt during employment with Defendants, Defendants
6 knowingly caused and permitted Plaintiffs to regularly work in excess of forty hours per
7 week without paying Plaintiffs one and one half of Plaintiffs' regular rate of pay.

8 24. By not paying overtime wages in compliance with the FLSA, Defendants violated
9 Plaintiffs' rights under the FLSA.

10 25. As a direct and proximate result of Defendants' failure to pay proper wages under the
11 FLSA, Plaintiffs incurred general damages in the form of lost overtime wages.

12 26. Defendants intentionally, with reckless disregard for their responsibilities under the
13 FLSA, and without good cause, failed to pay Plaintiffs proper wages, and thus
14 Defendants are liable to Plaintiffs for liquidated damages in an amount equal to lost
15 overtime wages, pursuant to 29 U.S.C. § 216(b) of the FLSA.

16 27. Defendants therefore owe Plaintiffs overtime not properly paid to Plaintiffs, in an amount
17 to be determined at trial.

18 28. Plaintiffs were required to retain legal assistance in order to bring this action and, as such,
19 are entitled to an award of reasonable attorney's fees pursuant to 29 U.S.C. § 216(b) of
20 the FLSA.

21 **COUNT THREE**

22 **VIOLATION OF CA LABOR CODE SECTION 201**

23 **FAILURE TO PAY WAGES DUE AND "WAITING TIME" PENALTIES**

24 29. Plaintiffs re-allege and incorporate the allegations of paragraphs 1-28 as if fully stated
25 herein.

1 30. At the time Plaintiffs' employment with Defendants was terminated, Defendants owed
2 Plaintiffs certain unpaid overtime wages in amounts previously alleged.

3 31. Failure to pay wages owed at an employee's termination as required by Labor Code §201
4 subjects the employer the payment of a penalty equaling up to 30 days wages, as
5 provided for in Labor Code § 203.

6 32. As of this date, Defendants have failed and refused, and continue to fail and refuse, to
7 pay the amount due, thus making defendants liable to Plaintiffs for penalties equal to
8 thirty (30) days wages, in an amount to be determined at trial.

9 33. Pursuant to Labor Code Section 218.5, Plaintiffs request that the court award Plaintiffs
10 reasonable attorney's fees and costs incurred in this action.

11 34. Pursuant to Labor Code Section 218.6, Plaintiffs request that the court award interest on
12 all due and unpaid wages, at the legal rate specified by Civil Code Section 3289(b),
13 accruing from the date the wages were due and payable.

14 **COUNT FOUR**

15 **VIOLATION OF CA BUSINESS AND PROFESSIONS CODE SECTION 17200**

16 **UNFAIR BUSINESS PRACTICES**

17 35. Plaintiffs re-allege and incorporate the allegations of paragraphs 1-34 as if fully stated
18 herein.

19 36. At all times relevant herein, Plaintiffs' employment with Defendants were subject to the
20 California Labor Code and applicable Wage Orders promulgated by the California
21 Industrial Welfare Commission, which required all employees to be paid overtime for
22 work performed in excess of forty hours per week or eight hours per day, unless
23 specifically exempted by law.

24 37. At all times relevant herein, as the employer of Plaintiffs, Defendants were subject to the
25 California Unfair Trade Practices Act (California Business and Professions Code §

1 §17000 et seq.), but failed to pay the Plaintiffs overtime pay as required by applicable
2 California Labor Code and applicable Wage Orders.

3 38. During the period Plaintiffs were employed with Defendants, Defendants failed to pay
4 Plaintiffs legally required overtime pay to which they were legally entitled, with
5 Defendants keeping to themselves the amount which should have been paid to Plaintiffs.

6 39. In doing so, Defendants violated California Unfair Trade Practices Act, Business and
7 Professions Code §17200, et seq. by committing acts prohibited by applicable California
8 Labor Code provisions, California Wage Orders, and the FLSA, thus giving them a
9 competitive advantage over other employers and businesses with whom Defendants were
10 in competition and who were in compliance with the law.

11 40. As a direct and proximate result of Defendants' violations and failure to pay the required
12 overtime pay, the Plaintiffs' rights under the law were violated and the Plaintiffs incurred
13 general damages in the form of unpaid wages in an amount to be determined at trial.

14 41. Defendants had been aware of the existence and requirements of the Unfair Trade
15 Practices Act and the requirements of State and Federal wage and hour laws, but
16 willfully, knowingly, and intentionally failed to pay Plaintiffs overtime pay due.

17 42. Plaintiffs, having been illegally deprived of the overtime pay to which they were legally
18 entitled, herein seek restitution of such wages pursuant to the Business and Professions
19 Code §17203 in an amount to be determined at trial.

20 **COUNT FIVE**

21 **VIOLATION OF CALIFORNIA LABOR CODE SECTION 226**

22 **INADEQUATE PAY STATEMENTS**

23 43. Plaintiffs re-allege and incorporate the allegations of paragraphs 1-42 as if fully stated
24 herein.

1 44. California Labor Code Section 226 provides that all employers shall provide to
 2 employees accurate and complete wage statements including, but not to limited to, an
 3 accurate and current statement of all rates paid for all regular and overtime hours worked
 4 during the pay-period, a complete and itemized statement of deductions, net wages
 5 earned, the dates fir which payment is being made, any and all applicable piece rates, and
 6 the current address ad name of the employer.

7 45. California Labor Code Section 226 further provides that any employee suffering injury
 8 due to a willful violation of the aforementioned obligations may collect the greater of
 9 either actual damages or \$50 for the first inadequate pay statement and \$100 for each
 10 inadequate statement thereafter.

11 46. During the course of Plaintiffs' employment, Defendants consistently failed to provide
 12 Plaintiffs with adequate pay statements as required by California Labor Code §226.

13 47. Defendants failed to provide such adequate statements willingly and with full knowledge
 14 of their obligations under Section 226.

15 48. Defendants' failure to provide such adequate statements has caused injury to the
 16 Plaintiffs.

17 49. Plaintiffs are therefore legally entitled to recover actual damages caused by Defendants'
 18 failure to provide proper records, in an amount to be determined at trial.

19 50. Plaintiffs have incurred costs and fees in bringing this action and seeks to recover such
 20 costs under California Labor Code §226.

21 **COUNT SIX**

22 **FRAUDULENT CONVEYANCE**

23
 24 51. Plaintiffs re-allege and incorporate the allegations of paragraphs 1-50 as if fully stated
 25 herein.

1 52. According to information and belief, Defendant NADER SARNEVESLIT, dba
2 PACIFICA CONSTRUCTION had engaged in a series of transactions, transferring its
3 assets to Defendant, BOBBY SARNEVESHT without receiving proper consideration,
4 and at the time of such transfer NADER SARNEVESLIT dba PACIFICA
5 CONSTRUCTION was insolvent or was rendered insolvent as a result of such transfer.

6 53. Furthermore, according to information and belief, Defendant NADER SARNEVESLIT
7 dba PACIFICA CONSTRUCTION transferred its assets to BOBBY SARNEVESHT
8 with actual intent to hinder, delay, or defraud the Plaintiffs. As such, these transfers of
9 assets constitute fraudulent conveyance under California Civil Code Section 3439.04 and
10 3439.05.

11 54. Plaintiffs are thus entitled to judgment setting aside the transfer or other appropriate
12 remedies.

13 **PRAYER FOR RELIEF**

14 **WHEREFORE**, Plaintiffs pray for the following relief:

15 55. For compensatory damages per CA Labor Code §1194 for unpaid overtime wages in an
16 amount to be determined;

17 56. For liquidated damages per the FLSA equal to unpaid overtime wages in an amount to be
18 determined at trial;

19 57. For restitution of unpaid overtime pay pursuant to California Business and Professions
20 Code §17203 in an amount to be determined at trial;

21 58. For waiting time penalty damages of thirty days wages to Plaintiff, pursuant to California
22 Labor Code § 203 in an amount to be determined at trial;

23 59. Damages and penalties for inadequate pay statements pursuant to California Labor Code
24 Section 226 in an amount to be determined at trial;

1 60. For pre-judgment interest of 10% on the unpaid overtime compensation and unpaid
2 salaries pursuant to California Labor Code §1194(a);

3 61. Plaintiffs ask the court to award reasonable attorney's fees pursuant to California Labor
4 Code §1194(a) and 29 U.S.C. §216(b) of the FLSA;

5 62. For costs of suit herein; and

6 63. For such other and further relief as the Court may deem appropriate.

7
8 Dated: June 3, 2008

By: /s/ Adam Wang
Adam Wang
Attorney for Plaintiffs